The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

OMNI INNOVATIONS, LLC, a Washington limited liability company; JAMES S. GORDON, JR., a married individual,

Plaintiffs,

v.

INVIVA, INC., a Kentucky and Delaware corporation, d/b/a American Life Direct, and American Insurance Co. Of New York; and JOHN DOES, I-X,

Defendants.

NO. 06-cv-01537-JCC

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO STAY THIS LITIGATION

NOTE ON MOTION CALENDAR: May 4, 2007

I. INTRODUCTION

Defendant Inviva, Inc. ("Inviva") respectfully files this reply in support of its Motion to stay this lawsuit pending resolution of Gordon et al. v. Virtumundo et al., Case No. CV06-0204-JCC, W.D.Wash. (Coughenour, J.) ("Virtumundo"). In its Opposition, Plaintiffs fail to even address the stays in two other anti-spam cases brought by Plaintiffs in this district. *See* Omni Innovations, LLC v. SmartBargains.com, LP, Case No. CV06-01129-JCC, W.D.Wash. (Coughenour, J.) ("SmartBargains"); Omni Innovations, LLC et al. v. Ascentive, LLC et al., Case No. CV06-01284-TSZ, W.D.Wash. (Zilly, J.) ("Ascentive"). Like SmartBargains and Ascentive, a stay should be entered in the present

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lawsuit.

In fact, Plaintiffs agree that a stay should be entered in this case. (*See* Opposition at p.6, 9-10, "Gordon does not object to a short stay in this case"). Accordingly, the only issue before this Court is how long this lawsuit should be stayed. For the reasons stated below, Defendants respectfully request that the Court enter a stay coterminous with the stays entered in SmartBargains and Ascentive.

II. VIRTUMUNDO MAY HAVE A DISPOSITIVE EFFECT ON PLAINTIFFS' STANDING UNDER CAN-SPAM

Plaintiffs' principal argument in support of their Opposition is that the pending motions in Virtumundo are not dispositive. This argument is plainly contradicted by the record in Virtumundo. In that case, Plaintiffs moved for relief on the narrow and undisputably "technical" argument that CAN-SPAM requires that incoming emails display the full legal name of the sender(s) of the email. (*See* Virtumundo, Dkt. # 53). Defendants, however, moved for summary judgment of the entire litigation. (*See* Virtumundo, Dkt. # 98). Accordingly, among the possible outcomes on those motions is either (i) dismissal of Plaintiffs' case on summary judgment; or (ii) an order rejecting Plaintiffs' "from line" theory. Either of which would be dispositive of the majority of Plaintiffs present lawsuit.

Plaintiffs' argument dismisses the legal significance of standing under CAN-SPAM (and, therefore federal subject matter jurisdiction) as if it were immaterial to federal litigation. Defendants have consistently asserted that Plaintiffs do not have standing to bring their claims under CAN-SPAM because they do not constitute an Internet Access Service *adversely effected* by a violation of the Act. *See* 15 U.S.C. 7706(g)(1). As briefed in Virtumundo, it highly dubious whether Plaintiffs can establish standing under CAN-SPAM because of the limited services provided by Plaintiffs and the lack of an actual adverse effect from defendants' emails. Under the doctrine of issue

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preclusion/collateral estoppel, such a ruling would preclude Plaintiffs from bringing federal subject matter claims and would have a substantial effect on the instant lawsuit.

III. PLAINTIFFS ARE UNLIKELY TO PREVAIL IN THIS LITIGATION

The Court is also likely to rule that Plaintiffs' state law claims are pre-empted by CAN-SPAM, thereby dismissing this lawsuit in its entirety. CAN-SPAM is explicit that it preempts any state law that regulates the use of electronic mail to send commercial messages, except to the extent that such statute prohibits falsity or deception. 15 U.S.C. § 7707(b). The state law claims under RCW 19.190 ("CEMA") alleged by Plaintiffs are not relevant to falsity or deception; rather, they are admittedly technical in nature. (*See* Opposition at 5:13-15, providing that "The defendants' fraudulent "from" lines are only one of the technical violations that Gordon has alleged under the statutes." (emphasis added)). Plaintiffs make no claim that they were actually deceived by any emails sent by Defendants or that they could not readily identify the sender and subject matter of the emails. Plaintiffs' state law claims are merely technical theories of email header protocol, which are preempted by CAN-SPAM. Without CEMA claims (and the incidental claims under RCW § 19.86), Plaintiffs would have no surviving causes of action.

Plaintiffs cannot point to any case in which their theories have prevailed. In fact, the courts that have addressed similar issues have taken a dim view of professional anti-spam plaintiffs alleging technical violations. *See* Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F. 3d 348 (4th Cir. 2006) and Benson v. Or. Processing Serv., Inc., 136 Wn. App. 587 (Wash. Ct. App. 2007).

In Mummagraphics, the Fourth Circuit Court of Appeals held that permitting claims under state law for immaterial errors would subvert Congress' intent to create a national standard under CAN-SPAM:

> In sum, Congress' enactment governing commercial e-mails reflects a calculus that a national strict liability standard for errors would impede "unique opportunities for the development and growth of frictionless commerce," while

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> more narrowly tailored causes of action could effectively respond to the obstacles to "convenience and efficiency" that unsolicited messages present.

Mummagraphics, 469 F.3d at 348. Similarly, in Benson v. Or. Processing Serv., Inc., the Washington Court of Appeals rejected the claims of an anti-spam plaintiff who, like Plaintiffs, refused to unsubscribe to commercial emails in the unsubscribe link supplied by the email sender. The unwillingness of a plaintiff to utilize functional or automated means to prevent receipt of future emails was grounds for rejecting a state law claim under CEMA. Benson, 136 Wn. App. at 591.

Plaintiffs' only purposed legal support for their novel "from line display name" theory is a proposed FTC regulation. This matter is also before the Court in Virtumundo. (*See* Virtumundo, Dkt # 82 at 18, Response to Motion for Partial Summary Judgment). Plaintiffs fail to inform the Court that the FTC regulation is merely proposed and has not been adopted by the FTC. *See* 70 Fed. Reg. 25426, 25452 (May 12, 2005). Accordingly, the regulation has no force of law and should be disregarded by this Court.

Assuming, *arguendo*, that the FTC regulation had been adopted, then it still would not be dispositive under the precedent in Mummagraphics. CAN-SPAM and the FTC are primarily concerned with whether a sender of commercial email can be identified and located and not mere display name technicalities. A "from" line that contains the sender's actual email address should be held to "accurately identify" the person who initiated the message for the purpose of CAN-SPAM. *See* 15 U.S.C. § 7704(A)1(b). Plaintiffs proposed "from line" is not based on adopted law and is technical in nature. Therefore, it is unlikely to prevail.

IV. CONCLUSION

Plaintiffs have filed dozens of lawsuits in Washington federal courts alleging violations of CAN-SPAM and CEMA. Those cases are percolating through the courts and the parties are, in the near future, likely to have substantial guidance on the legal

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landscape upon which these claims have been brought. It makes no sense to pursue lengthy and expensive discovery on matters that may be foreclosed in the near future.

Plaintiffs agree that a stay is appropriate but do not propose a date for lifting that stay. Defendants respectfully request that the Court stay this litigation until such time as the stays in SmartBargains and Ascentive are lifted.

DATED this 4th day of May, 2007.

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